

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 707

DEMURRAGE LIABILITY

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY
IN RESPONSE TO NOTICE OF PROPOSED
RULEMAKING**

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Norfolk Southern Railway Company (“NS”) offers the following Reply Comments in Response to comments regarding the Board’s Notice of Proposed Rulemaking served May 7, 2012.

INTRODUCTION

The comments submitted in response to the May 7 Notice of Proposed Rulemaking (“NPR” or “Notice”) provide no reason for the Board to diverge from the course charted in the Notice, which makes clear that all receivers are potentially liable for reasonable demurrage charges, and in particular that intermediaries who handle railcars should not be exempt from the demurrage system by virtue of their status, or lack thereof, with respect to the bill of lading. As discussed in more detail below, Norfolk Southern views the comments as lending substantial support to the Board’s basic approach, as well as to the specific revisions that NS has proposed. However, the comments also demonstrate that the Board should abandon its proposals to require “actual” notice and to create an “agency” exception.

First, there is substantial support in the comments for NS's position that the "actual notice" requirement is unnecessary and likely would create problems that interfere with the efficient administration of a demurrage regime meeting Congress's goals. The Board should remove that provision.

Second, there is substantial support in the comments for NS's position that the "agency" exception will be misused by some opportunistic intermediaries to avoid responsibility in nearly every case, without providing any meaningful alternative for railroads to collect demurrage relating to delays occasioned by those intermediaries. Debate over this issue in the comments reflects more of the finger-pointing among intermediaries, shippers, and others that gave rise to the need for Board action in the first place, and which railroads should not have to sort out as a pre-condition to their efficient administration of a reasonable demurrage program.

Third, CSX and other commenters express concern that the Board's proposed rule would undermine the traditional means by which demurrage is established. NS shares this concern, but believes that there is in fact no inconsistency between the Board's proposed approach and the ability of railroads and courts to continue to rely on the bill of lading and Section 10743 in demurrage cases involving parties to the bill of lading. Norfolk Southern does recommend, however, that the Board remove any potential confusion in this regard by clarifying that the basis of liability set forth in the rule merely supplements, and does not supersede, any existing and traditional basis for establishing the obligation of a party to the bill of lading to pay demurrage.

Fourth, a number of commenters continue to complain about other aspects of the demurrage process, such as issues relating to bunching and constructive placement.

These issues are not appropriate in this proceeding because they focus on a different question – whether demurrage is reasonably assessed. This rulemaking is about who should be liable for demurrage assuming that it is reasonably assessed. Accordingly, the Board has sensibly left issues related to bunching and constructive placement “beyond the scope of this proceeding” (NPR Comments at 6 n.16), and thereby reserved them for case-by-case resolution under the well-developed body of Board precedent.

Finally, Kinder Morgan asserts that the Board’s rule would violate the Administrative Procedure Act. As explained below, Kinder Morgan is mistaken.

I. COMMENTS IN RESPONSE TO THE BOARD’S PROPOSED RULE REINFORCE THE NEED FOR BOARD ACTION ESTABLISHING THAT DEMURRAGE IS APPROPRIATELY APPLIED TO *ALL* RECEIVERS OF RAILCARS

The comments on the Board’s proposed rule reinforce the need for Board action establishing that Congress’s express goals for the demurrage system, as reflected in 49 U.S.C. § 10746, demand that all entities that handle railcars – including non-consignee intermediaries – should be subject to potential liability for reasonable demurrage charges, and that no such entities should be exempt from the demurrage system. Railroads and shippers, who depend most directly on the efficiency of freight car utilization, support the thrust of the Board’s rule, which confirms that intermediaries are not exempt from demurrage liability. For example, the National Industrial Transportation League (“NITL”) argues quite persuasively that intermediaries should not be able to avoid liability by pointing to shippers or others. NITL NPR Comments at 4; *see also* UP NPR Comments at 4-5; CSX NPR Comments at 4-5; BNSF NPR Comments at 2, NS NPR Comments at 6-7.

The divergence expressed in the comments between the views of shippers and the perspective of intermediaries also highlights the need for the proposed rule. NITL supports extending liability to intermediaries but argues that *only* the party handling the railcar ought to be liable for demurrage – *i.e.*, neither the shipper nor ultimate receiver should be liable. NITL NPR Comments at 6. Intermediaries, by contrast, contend that the Board should retain the supposed “longstanding practice” that *only shippers* are liable for demurrage. *See, e.g.*, International Liquid Terminals Association (“ILTA”) NPR Comment at 1-2.

This finger-pointing is crystallized most poignantly in the comments addressing the Board’s proposed agency exception. NITL explains based on shipper experience that warehousemen will have incentives to “assert an agency relationship when such relationship may not exist.” NITL NPR Comments at 6. Intermediaries, by contrast, point the finger at *shippers*, arguing that it is the shippers’ conduct that often leads to inefficient railcar utilization and that the intermediaries are in any event acting on behalf of (if not, legally speaking, agents of) the shippers. *See* ILTA NPR Comments at 1-2; Continental Terminals, Inc. NPR Comments at 1.

Norfolk Southern submits that the very existence of these conflicting points of view confirms that the Board should adopt its proposed rule in order to make clear that intermediaries may be held liable under railroad demurrage tariffs. Without such a rule, parties will continue to seek to shift responsibility to others, undermining Congress’s objective that demurrage charges be collectible, so as to provide incentives for the efficient handling of railcars. Railroads should not have to sort these kinds of disputes

out as a pre-condition to their administration of the efficient system of demurrage Congress has demanded in Section 10746.

Further support for the basic thrust of the Board's rule is provided by the large number of comments expressing the view that intermediaries typically have contractual relationships with the shippers that direct railcars to them for unloading, and that those relationships can play an important role in apportioning financial responsibility for demurrage charges. Kinder Morgan, for example, emphasizes that “demurrage liability is easily handled through contracting.” Kinder Morgan NPR Comments at 12. Independent Fuel Terminal Operators Association (“IFTOA”) similarly points out that shippers “seek reimbursement for [demurrage] charges from [the intermediary]... if the shipper believed that the [intermediary] caused the problem.” IFTOA NPR Comments at 2. *See also* ILTA NPR Comments at 1-3; The Fertilizer Institute NPR Comments at 1; International Association of Refrigerated Warehouses (“IARW”) NPR Comments at 2.

Norfolk Southern endorses the notion that demurrage can be effectively handled through contracts worked out in the marketplace, without the need for Board or court processes. But that is not the issue. The fact that intermediaries *routinely do* enter into contracts with their customers (shippers or others) that allocate demurrage liability strongly supports a rule enabling railroads to hold the intermediaries who handle railcars responsible for demurrage. The parties to these contractual arrangements are far better equipped than railroads – who are in any event not informed of such contractual arrangements – to sort out their respective contractual obligations. To the extent that certain comments can be read to suggest that railroads and intermediaries should themselves enter into contracts assigning demurrage liability (*e.g.*, IWLA NPR

Comments at 3), they ignore that there is simply no incentive for the intermediaries to enter a contract allowing the railroad to assess demurrage charges. Indeed, there usually is no underlying direct commercial relationship between the railroad and the intermediary. By making clear that the intermediary is potentially liable for demurrage charges, the Board's proposed rule provides intermediaries with incentives to address demurrage by contract. The intermediary and the shipper of course remain free to address such matters contractually, and, with their newly-established potential legal responsibility for demurrage charges in accord with railroad tariffs, intermediaries may also come to have incentives enter contracts with their serving railroads addressing that issue. The Board's proposed rule will thus achieve Congress's goals for an efficient demurrage system far more effectively than leaving railroads to chase from one pointed finger to the next in search for some party to hold responsible.¹ The Board should proceed to adopt these core aspects of its proposed rule.

II. COMMENTS ON THE PROPOSED RULE SUPPORT THE ELIMINATION OF THE REQUIREMENT THAT RAILROADS PROVE "ACTUAL NOTICE"

The comments on the Board's proposed rule support the elimination of the rule's "actual notice" requirement.

¹ Responsibility for demurrage could in theory also be addressed in contracts between the railroad and the intermediary, but there are significant obstacles to working out such arrangements. Most importantly, railroads typically lack a commercial relationship with the intermediary; intermediaries are destinations to which cars are directed for delivery, but typically do not pay freight bills, and thus typically do not have any contractual or other commercial relationship directly with the carrier. NS Opening Comments at 20; American Short Line and Regional R.R. Ass'n ("ASLRRRA") NPR Comments at 3. Second and also of vital importance, because railroads as a practical matter cannot embargo traffic (or otherwise decline deliver of cars) destined to a particular intermediary, intermediaries have little if any *incentive* to enter agreements with their serving railroad providing for payment of demurrage charges. NS NPR Comments at 12; NITL NPR Comments at 8. These facts similarly provide strong support for the rule proposed by the Board.

First, the comments underscore that providing “actual notice” is *not necessary* in order for intermediaries to be fully aware that their serving railroad administers a system of demurrage charges – as prescribed by Congress in Section 10746 – and that intermediaries who handle railcars are among the participants in the railroad network who may be called upon to pay demurrage charges thereunder when the intermediary detains railcars. The comments submitted by intermediaries reflect a complete awareness of these central facts. *See* IWLA NPR Comments at 5; ILTA NPR Comments at 2; Kinder Morgan NPR Comments at 2-3.² Publication by the Board of its final rule will only cement that awareness. Armed with knowledge of their potential responsibility, these intermediaries will have no difficulty looking up the specific terms of the serving railroad’s demurrage tariff on the carrier’s public website. *See* NS NPR Comments at 9. Accordingly, there is no valid reason why any further notice should be required.

Second, a consistent refrain in the comments is that an actual notice requirement is likely to lead to unproductive disputes that get in the way of the efficient administration of a demurrage regime. If failure of “actual notice” is to be a defense to demurrage liability, intermediaries will inevitably interpose numerous disputes about such matters as whether the intermediary actually saw the notice, whether the notice was addressed to the correct legal entity (especially in cases of successorship and the like), whether the notice was sufficiently specific, and countless more issues that intermediaries will have strong incentives to raise to avoid potential liability under the Board’s proposed rule. *See, e.g.*, AAR NPR Comments at 6-7; UP NPR Comments at 6-7; NS NPR

² There is widespread support for the notion that receivers of railcars are aware of the demurrage tariffs of their serving railroads. ASLRRRA NPR Comments at 3-4; CP NPR Comments at 5, 7; NS NPR Comments at 9; AAR NPR Comments at 6.

Comments at 11-12; CP NPR Comments at 8-9. Commenters also confirm that railroads are in a poor position to keep track of the identities of the entities to which they deliver railcars because they often have no formal shipping relationship with those businesses. *See* ASLRRRA NPR Comments at 3. The intermediaries themselves acknowledge these problems when the tables are turned, as reflected in their opposition to the proposed requirement that they provide notice of their agency status in order to exempt themselves from demurrage charges.³ *See* Kinder Morgan NPR Comments at 13; IFTOA NPR Comments at 3; *see also* ILTA NPR Comments at 3. The Board should recognize the many problems with any actual notice requirement, and remove it from the rule.

If the Board does retain the actual notice rule, none of the comments call into question the appropriateness of NS's proposed revisions, which would add safe harbors precluding later dispute about the adequacy of notice when railroads follow certain steps. *See* NS NPR Comments at 13-14.⁴ However, the Board should recognize that even NS's suggested revisions are distinctly inferior to the elimination of the notice requirement

³ As discussed below (at pages 12-15), NS urges the Board to eliminate the agency exception, thereby removing any burden on intermediaries to provide notice of their agency status. NS observes, however, that, in the event the agency exception is retained it would be vital that railroads receive clear, shipment-by-shipment notification of the identity of the intermediary's principal, because, *unlike the intermediary's potential responsibility for demurrage*, such information is outside the knowledge of the railroad but is essential if the railroad is to attempt to take steps to seek recovery of demurrage charges from the intermediary's principals.

⁴ *See, e.g.*, CP NPR Comments at 9. There is certainly no basis for expanding the notice requirement to require railroads to chase down the supposed "principals" identified by intermediaries seeking to avoid responsibility. *See* NITL NPR Comments at 7. If the principal-agent relationship is real, communication should flow directly between those entities and not through the railroad. If it is not, then there is no basis for seeking to notify the non-existent principal. In any event, as discussed in the next section, the agency exception should itself be removed, thus mooted this issue.

altogether in recognition of the obligation that all participants in the rail network have to be aware of the basic responsibilities that follow from that participation.

III. COMMENTS ON THE PROPOSED RULE SUPPORT THE ELIMINATION OF THE EXCEPTION FOR “AGENTS”

There is little doubt that the ability of intermediaries to opt out of liability for demurrage merely by asserting their agency status will vitiate the goal of having demurrage incentives apply to all receivers of railcars. As NITL explains, the Board’s proposed agency exception “will allow unchecked authority to shift demurrage liability.” NITL NPR Comments at 4. Comments by intermediaries make clear that they will always, or nearly always, claim to be agents, regardless of the facts. ILTA, for example, says that “[t]erminals would uniformly exercise their right to waive demurrage liability by providing notice [of agency].” ILTA NPR Comments at 3. This ought to be proof enough that the agency exception is misguided. Such blatant flouting of responsibility for efficient car handling will leave railroads right back at the starting point: unable to pursue the intermediary, and in many cases without any practical ability to pursue the supposed third-party principal (and in any event with no basis for thinking the identified principal would not itself dispute liability).⁵ ASLRRA’s comments summarize the dilemma that railroads of all sizes face, explaining that “carriers can go from pillar to post trying to collect demurrage charges from consignees, consignors, warehousemen, other third party agents and principals who deny responsibility and point the finger at someone else who should be liable.” ASLRRA NPR Comments at 4-5.

⁵ As CSX explains, the “exception will only re-open the same type of alleged confusion the Board is attempting to resolve.” CSX NPR Comments at 13; *see also* AAR NPR Comments at 8-10; CPR NPR Comments at 9-11; UP NPR Comments at 7-8.

The comments also confirm that there is no bona fide agency law reason why intermediaries should not be held directly responsible for demurrage. Kinder Morgan, for example, emphasizes that the Board's agency exception should not be limited to "agents" under "the traditional principles of agency," but should extend to anyone who "merely performs a service on behalf of its customer." Kinder Morgan NPR Comments at 15. This confirms that there is no real agency issue at stake here. On Kinder Morgan's view of "agency", every rail-related business – including shippers, intermediaries and railroads alike – should be able to point to their ultimate customer instead of bearing the burdens associated with efficient railcar utilization.⁶ The result, of course, is that the system of demurrage will collapse, resulting in the inefficiencies that Section 10746 seeks to prevent.

Moreover, even if in some cases there may be bona fide principal-agent relationships between intermediaries and third parties (shippers or others), the comments confirm that those relationships do not extend to the handling of railcars at the intermediary's facility. One hallmark of a principal-agent relationship is control, yet the intermediaries make clear that no principal could exercise such control over their car handling. As one illustration, IFTOA confirms that their warehousing or other terminalling activities (and the car handling supporting those activities) are performed for numerous customers, no one of which could have control of the intermediary's loading, unloading and movement of railcars at its facility. *See, e.g.*, IFTOA NPR Comments at 3 (terminals receiving 60 cars per day from "as many as 30 or more shippers"). Car

⁶ Consider the implications of Kinder Morgan's view in settings encountered in day-to-day life. The automotive repair shop that changes your oil would be your agent, able to point to you as the party responsible for their improper disposal of used oil.

handling activities are not activities within the scope of any principal-agent relationship – they are under the control of the intermediary itself in pursuit of its own warehousing or terminalling business. Accordingly, NS reiterates its position that the Board should abandon the proposed rule’s exception for “agents.”

If the Board nevertheless retains an exception applicable to bona fide principal-agent relationships, the requirements for invoking that exception should be tightened, as NS has suggested (NS NPR Comments at 14 n.7), not watered down as some intermediaries propose. *See* Kinder Morgan NPR Comments at 15. Intermediaries complain about the burdens of having to give notice of their agency status, especially if notice must be given on a shipment-by-shipment basis. NS is sympathetic to these concerns, which are in part the same concerns NS has with the proposed requirement that the railroad provide actual notice of its demurrage tariff. But the need for notice is greatly highlighted in the context of asserted agency status. If an agency exception is not to gut the rule altogether, however, invoking the exception must lead to collection from a true principal who accepts its responsibility to pay reasonably imposed demurrage. Especially given the fact that intermediaries typically act for different customers/clients with respect to each shipment (*see* IFTOA NPR Comments at 3), a blanket notice that the intermediary is an agent would be useless, as it would not direct the railroad to an entity with actual responsibility for the specific railcars that were detained. Instead, to advance the goals of Section 10746, notice would have to be provided on a shipment-by-shipment basis (*i.e.*, with respect to each railcar), *and in addition* would have to convey a

certification that the asserted principal will accept liability and a feasible process for collecting from that principal.⁷

IV. THE COMMENTS SUPPORT NORFOLK SOUTHERN'S SUGGESTION THAT THE BOARD CLARIFY THAT ITS PROPOSED RULE DOES NOT OVERRIDE PRE-ESTABLISHED BASES FOR IMPOSING DEMURRAGE LIABILITY

CSX expresses concern that the Board's interpretation of Section 10743 and the language of the proposed rule will "disrupt current practice where it is working well and cause disunity among the courts where there currently is none." CSX NPR Comments at 1-2. Norfolk Southern strongly supports the spirit of CSX's comments. The Board *should not* take action that disrupts the well-settled ability of railroads to seek collection of demurrage based on contractual or quasi-contractual liability established by the bill of lading itself.

Norfolk Southern does not believe that the Board intended to cause any such disruption because it has for so long been settled that demurrage liability may attach through alternative means.⁸ There is no inconsistency between the Board's proposed rule, which makes clear that the bill of lading is *not the only basis* for establishing a receiver's liability for demurrage, and the continued vitality of the principle that the bill of lading *also* establishes such liability. Likewise, the Board's interpretation of Section 10743 is not an obstacle to establishing liability for demurrage based on the bill of lading. The Board has not concluded that demurrage associated with a particular freight shipment

⁷ If there is an agency exception, NS also supports the revision proposed by CSX, which would make intermediaries liable if they are found to have given incorrect information regarding their agency status. *See* CSX NPR Comments at 13.

⁸ *See also* UP NPR Comments at 2-3 n.1 ("UP does not believe the Board intended to disrupt the existing legal basis for collecting demurrage under the bill of lading").

is outside the scope of the “transportation services” covered by the bill of lading (and thus by Section 10743). Instead, the Board merely recognized that Section 10743’s focus on freight shipments – rather than car handling – indicates that the provision does not govern charges for demurrage under any and all circumstances, since those charges can arise from railcar handling by parties who are not directly bound by the bill of lading. Thus, it is entirely appropriate to view Section 10743 as applying when the demurrage liability of a consignor or consignee is sought to be established by the bill of lading as a matter of contract – as one part of railroad’s charges associated with a given freight movement covered by that shipping document – while simultaneously recognizing that Section 10743 does not preclude or limit efforts to establish demurrage liability on other bases.

As the Board is aware, there have always been alternative means for establishing demurrage liability apart from the bill of lading. In the *Evans Products* case, for example, the Seventh Circuit observed that liability “may be imposed only against a consignor, consignee, or owner of the property, *or others by statute, contract, or prevailing custom.*” *Evans Prods. Co. v. I.C.C.*, 729 F.2d 1107, 1112 (7th Cir. 1984). Section 10746 is certainly one such alternative basis. *See* NS Opening Comments at 9.

To the extent CSX is concerned about courts misinterpreting language in the Board’s Notice to override well-established contractual bases of liability for demurrage, that concern can readily be overcome by adopting the preamble that CSX proposes (CSX NPR Comments at 5), or the clarification that NS proposed (NS NPR Comments at 8). Either approach adds a straightforward clause to the beginning of Section 1333.3 stating in substance that the basis for liability set forth in the rule is “[i]n addition to any other

valid legal basis for imposing liability for demurrage charges.” Other comments support a similar clarification. *See* BNSF NPR Comments at 3; CP NPR Comments at 11.

V. THE BOARD SHOULD CONTINUE TO LEAVE FOR CASE-BY-CASE ADJUDICATION IN OTHER PROCEEDINGS CONCERNS ABOUT THE “UNREASONABLENESS” OF ASSESSING DEMURRAGE IN PARTICULAR SITUATIONS

Several commenters continue to complain about rail carrier actions that they assert contribute to delays. *See* Continental Terminals NPR Comments at 1-2; IWLA NPR Comments at 2, 8-11; ILTA NPR Comments at 3; IFTOA NPR Comments at 1-2. Some complain about the practices related to “bunching,” when carriers hold cars for delivery. Others complain about demurrage charges during the period of “constructive placement,” when cars available for delivery to the receiver are held in the railroad’s yard until space is available at the receiver’s facility or for other reasons.

As the Board’s Notice states, complaints such as these are “outside the scope of this proceeding.” NPR at 6 n.16.⁹ Those complaints involve the question of *when* it is proper – or reasonable – for a railroad’s demurrage tariff to establish liability. The Board has well-developed jurisprudence addressing that question, including the specific issues of bunching and constructive placement.¹⁰ And in any event, the Board’s proposed rule will not affect that precedent or pre-judge the reasonableness of assessing demurrage in any particular circumstances. Instead, it only addresses *who* may be held liable *when*

⁹ The decision to remove these issues from the scope of the proceeding was the correct one, and made deliberately after the Board solicited comment on such issues as constructive placement. *See* ANPR at 7. As a result, no rule concerning these matters could properly be promulgated in this proceeding.

¹⁰ Board precedents address bunching and constructive placement issues in depth. *See, e.g., Capitol Materials Inc.-Petition for Declaratory Order-Certain Rates & Practices of Norfolk Southern Ry. Co.*, 7 S.T.B. 576, 581-82 (2004) (examining claims of “bunching”); *id.* at 585 (examining claims relating to “constructive placement”).

demurrage is properly assessed. Establishing a rule in this proceeding will not affect the Board's well-established process of determining, on a case-by-case basis, when demurrage is reasonably assessed.

VI. THE ADMINISTRATIVE PROCEDURE ACT ISSUES RAISED BY KINDER MORGAN ARE WITHOUT MERIT

Finally, Kinder Morgan argues that the Board's rule would violate the Administrative Procedure Act. Kinder Morgan is incorrect. There is no APA infirmity in the Board's proposed rule or the procedures used to develop it.

First, Kinder Morgan contends that the rule would exceed the Board's "statutory jurisdiction, authority or limitations" because demurrage is "a regulatory area that Congress explicitly reserved for rail carriers." Kinder Morgan NPR Comments at 7. Kinder Morgan is wrong. To be sure, Section 10746 reflects Congress's desire that the railroads play an important role in the demurrage system by setting demurrage terms that ensure the efficient use of railroad cars, subject to the Board's power to review the reasonableness of those terms. *See* 49 U.S.C. § 10702.

But Congress also intended that the Board play a vital role in regulating in this area as well. As the courts have held, the predecessor to Section 10746 gave the ICC "rather broad authorization" to regulate demurrage. That provision "not only direct[ed] the ICC to compute demurrage charges with the purpose of enhancing freight car supply, utilization, and distribution but also mandate[d] the agency to establish 'rules and regulations relating to such charges.'" *Baltimore & Ohio Chicago Terminal R.R. v. United States*, 583 F.2d 678, 683 (3d Cir. 1978) ("*B&OCT.*"). This authority was preserved under the Interstate Commerce Commission Termination Act, contrary to Kinder Morgan's argument based on a single wording adjustment. Kinder Morgan NPR

Comments at 7. The legislative history of Section 10746 states unequivocally that Section 10746 “retains the agency’s authority over demurrage charges and related rules.” See H.R. Rep. No. 104-311, at 100 (1995). Even if it were not abundantly clear that the Board is acting within its statutory authority, to the extent there were any ambiguity the Board’s reasonable interpretation of Section 10746 would prevail. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1994); *B&OCT*, 583 F.2d at 684.

Thus, the Board’s proposed rule herein exercises the Board’s regulatory authority; it does not, as Kinder Morgan asserts, “rewrite” Section 10746. Kinder Morgan NPR Comments at 9. Railroads, of course, are entitled to the initiative in establishing their applicable demurrage terms, but that initiative does not oust the Board’s regulatory authority over the demurrage system to implement the goals Congress codified in Section 10746.

Lest there be any doubt, the Board’s statutory authority and responsibility over demurrage has always been extensive. See, e.g., *B&OCT*, 583 F.2d at 685 (upholding rule requiring carriers to remit a portion of all demurrage charges to the car owner); *North American Freight Car Ass’n. v. S.T.B.*, 529 F.3d 1166, 1177-79 (D.C. Cir. 2008) (upholding Board’s approval of revisions to railroad demurrage tariff); *Field Container Corp. v. I.C.C.*, 712 F.2d 250, 257 (7th Cir. 1983) (deferring to Commission’s interpretation of average demurrage tariff); *Cleveland Electric Illuminating Co. v. I.C.C.*, 685 F.2d 170, 172 (6th Cir. 1982) (upholding Commission’s decision not to exercise its power to excuse demurrage); *Union Pacific R.R. v. FMC Corp.*, 2000 WL 134010 (E.D.

Pa. 2000) (referring questions of interpretation of demurrage portions of tariff to Board under primary jurisdiction doctrine).

Kinder Morgan's contention that Congress reposed regulatory power over demurrage solely in the hands of railroads is also somewhat bizarre. Were Kinder Morgan correct that Congress had placed demurrage charges in the sole control of railroads to assess and administer, there would be no regulatory limits on the circumstances when railroads could demand payment from intermediaries like Kinder Morgan. Kinder Morgan likely would be among the first to dispute this proposition, and seek Board intervention to limit the assessment of demurrage charges by rail carriers – as many other shippers and intermediaries have.¹¹ Yet its invocation of the Board's authority in such a case would necessarily acknowledge the Board's role in ensuring that Congress's goals for the demurrage system are met. Kinder Morgan cannot have it both ways.

Second, Kinder Morgan argues that the Board's rule is not supported by substantial evidence. As a threshold matter, this is not a cognizable APA objection to a notice-and-comment rulemaking such as this proceeding. The "substantial evidence" test applies only to adjudications conducted in accordance with sections 556 and 557 of the APA, see 5 U.S.C. § 706(2)(E), not to "notice and comment rulemaking" such as in this proceeding. *B&OCT*, 583 F.2d at 684-85.

In any event, the evidence supporting the aspects of the Board's proposed rule that Norfolk Southern supports would amply satisfy this standard even if it applied. Kinder Morgan makes the unsubstantiated – and incorrect – claim that the "evidence

¹¹ See page 17, note 10 above, and page 21, note 13, below.

submitted here demonstrates only” that rail carriers and shipper/consignors have “control over placement, movement or release of railcars before, during, or after unloading.” Kinder Morgan NPR Comments at 9. Kinder Morgan is mistaken. In fact, the record in this proceeding is replete with *evidence* – including NS’s March 7, 2011 Opening Comments, which were *verified* by Damon Deese, NS’s Manager of Revenue Accounting Customer Services – that intermediaries in fact play an important role in the railcar handling process. *See* NS Opening Comments at 12-15; *see also, e.g.*, AAR Opening Comments at 4-6; CP Opening Comments at 4-5. That record supplements the Board’s own extensive experience with industry-wide car supply and utilization issues¹² and in countless adjudications relating to demurrage charges.¹³

Further, the existence of the regulatory gap that has been created by intermediaries and highlighted by the *Groves* decision is now widely known. Acknowledging that this problem exists, the Solicitor General of the United States argued to the Supreme Court that it need not wade into the demurrage issue because the Board was aware of it and was holding a rulemaking to resolve it. Brief of the United States as Amicus Curiae at 12-13, 17. *Norfolk Southern Ry. Co. v. Groves*, 131 S. Ct. 993 (2011) (No. 09-1212), 2010 WL 5069532.

¹² Two prominent examples are the Board’s demurrage remittance proceeding (Ex Parte No. 289), addressed in the *B&OCT* case, and the Board’s extensive consideration of car supply and utilization issues in its car hire depreservation proceedings, *e.g.*, *Railroad Car Hire Compensation – Rulemaking*, 9 I.C.C.2d 80 (1992); 9 I.C.C.2d 582 (1993); and 9 I.C.C. 1090 (1993), *appeal dismissed sub nom. Southern Pac. Transp. Co. v. I.C.C.*, 69 F.3d 583 (D.C. Cir. 1995).

¹³ *See*, cases cited above at pages 19-20; *see also* *Portland & Western R.R. – Petition for Declaratory Order – RK Storage & Warehousing, Inc.*, STB Docket No. 35406 (Sept. 27, 2011); *Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (May 29, 2008); *South-Tec Development Warehouse, Inc. & R.R. Donnelly & Sons Co. – Petition for Declaratory Order – Illinois Central R.R.*, STB Docket No. 42050 (Nov. 13, 2000).

There is thus no question that ample evidence supports the need for demurrage to be applicable to intermediaries that handle railcars. *See, e.g., Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 705 (1980) (“judicial review under the substantial evidence test is ultimately deferential,” citing cases, and noting that the agency decision is entitled to a presumption of validity); *BNSF Ry. Co. v. S.T.B.*, 526 F.3d 770, 776 (D.C. Cir. 2008) (deferring to Board’s ability to balance competing policy objectives in applying substantial evidence test).

Kinder Morgan appears to be arguing that there must be substantial evidence in this record that intermediaries will be at fault in *each and every case* before adopting a rule that railroads may impose liability for valid demurrage charges on intermediaries. The Board’s burden in establishing its rule is not nearly so heavy. The proposed rule does not pre-judge whether demurrage in a particular instance was reasonably assessed. The point is, as the Board’s rule establishes, that intermediaries ought not to be exempt from the demurrage system. To support this rule, it is sufficient that there be a gap in the demurrage system as to intermediaries – a fact that is amply demonstrated on this record. *See* NPR at 4-5.

Kinder Morgan’s real dissatisfaction appears to be less about the sufficiency of the evidence supporting the Board’s proposed rule than its belief that carriers have from time to time sought to collect demurrage from Kinder Morgan “when the shipper is the party at fault.” *Id.* at 9. If Kinder Morgan believes that such circumstances would render demurrage charges unreasonable, the proposed rule would do nothing to disturb Kinder Morgan’s ability to defend against such charges under the particular circumstances in which they might be assessed. The proposed rule also would not prevent Kinder Morgan

from entering into contracts with shippers to allocate responsibility for demurrage that accrues while Kinder Morgan holds the cars.¹⁴ Indeed, as Kinder Morgan itself recognizes, if intermediaries are held responsible for demurrage that in their view is properly the responsibility of the shippers, there is no obstacle to those intermediaries addressing the issue in their contracts with shippers. *See* Kinder Morgan NPR Comments at 11. As Kinder Morgan asserts, “demurrage liability is easily handled through contracting.”¹⁵ *Id.* at 12.

Third, Kinder Morgan argues that the proposed rule does not further Congress’s policy goals as expressed in 49 U.S.C. § 10746. Kinder Morgan NPR Comments at 10. In essence, Kinder Morgan contends that the behavior of intermediaries is not the *sole* potential factor bearing on the efficiency of railcar utilization, but there has never been any dispute about this. The Board’s NPR makes clear that shippers, receivers, and railroads, *in addition to intermediaries*, have responsibilities with respect to car handling.¹⁶ Far from “singling out intermediaries” (Kinder Morgan NPR Comments at 10), the Board’s proposed rule is designed to fill a gap in the existing demurrage system so as to treat intermediaries like other parties who participate in the handling of railcars.

Fourth, contrary to Kinder Morgan’s “sky-is-falling” rhetoric, the Board’s proposed rule would not precipitate a “constitutional crisis” and it would not “reverse” or

¹⁴ For the same reason, ILTA is incorrect in asserting that the proposed rule “presumes” that terminals are “disproportionately liable” for any demurrage that is incurred.” ILTA NPR Comments at 3-4.

¹⁵ As discussed above at page 9, note 1, the same is not true with respect to the intermediary’s liability to railroads, because railroads have no practical ability to refuse to deliver freight to an intermediary who declines to enter a formal contract establishing its responsibility for demurrage.

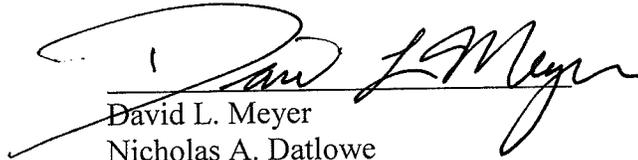
¹⁶ NPR at 2-4. For example, railroads generally will not be able to collect demurrage at all in circumstances where their conduct was the cause of undue delay in utilization of railcars.

“vacate” any ruling of any federal court of appeals. *Id.* at 11. For example, the Notice would have no direct effect on the rule established by the Eleventh Circuit in *Groves*: if a railroad sought to establish the liability of an intermediary based on its designation as “consignee” in the bill of lading, the railroad would *still* be required to show that the intermediary had “assent[ed] to being named as a consignee on the bill of lading ... or at the least, [had been] given notice that it [was] named as a consignee in order that it might object or act accordingly.” *Norfolk Southern Ry. v. Groves*, 586 F.3d 1273, 1282 (11th Cir. 2009). The Board’s proposed rule does not purport to reverse or refuse to acquiesce in this ruling. Instead, it makes clear that – as directed by Congress in Section 10746 – there is an *alternative* basis for establishing the intermediary’s responsibility for demurrage charges. *See Evans Prods. Co. v. I.C.C.*, 729 F.2d 1107, 1112 (7th Cir. 1984). In this case, the alternative liability is based on the Board’s interpretation of Section 10746, as expressed in the Notice, finding that an intermediary may be liable for demurrage based on its handling of railcars. Because that rule will itself be subject to appellate review under the APA, there is no conceivable “constitutional crisis.”

CONCLUSION

The comments on the proposed rule do nothing to undermine, and in many respects strongly reinforce, the soundness of the foundation underlying the Board’s proposed rule. Those comments also provide further support for the elimination of the “actual notice” requirement and the “agency exception” so as to further Congress’s objectives for the operation of the system of railcar demurrage.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Meyer", is written over a horizontal line. The signature is fluid and cursive.

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Dated: September 21, 2012

CERTIFICATE OF SERVICE

I, Nicholas A. Datlowe, certify that on this date a copy of the Reply Comments of Norfolk Southern Railway Company in Response to Notice of Proposed Rulemaking, filed on September 21, 2012, was served by email and by first-class mail, postage prepaid, on all parties of record.


Nicholas A. Datlowe

Dated: September 21, 2012